FILE COPY

Office Supreme Court, U. S.
FILED
JAN 28 1936

Supreme Court of the United States

OCTOBER TERM, 1935

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION ..... *Appellants,*

v. No. 386

R. O. JENKINS ..... *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR APPELLEE

L. B. SMEAD,
Camden, Arkansas,
J. V. SPENCER,
C. E. WRIGHT,
ROBERT C. KNOX,
El Dorado, Arkansas,
Counsel for Appellee.

DEMOCRAT P. & L. CO., LITTLE ROCK

INDEX AND SUMMARY

Page

THE DECISION BELOW 5

STATEMENT OF CASE 6

ARGUMENT 7

1. A DECISION ON THE VALIDITY OF SECTION 7137 OF CRAWFORD & MOSES' DIGEST IS NOT NECESSARY TO THE DETERMINATION OF THIS CAUSE 7

Another statute, not here in question, (C. & M. Digest, 7144) also abrogates fellow-servant rule as to corporations, and would apply here.

2. RECORD FAILS TO SHOW APPELLANT OF CLASS ENTITLED TO RAISE QUESTION 10

This statute has been held valid as applying to corporations operating railroads, and similar statutes applying to companies operating mines have been held valid. The burden was on appellant to show that it did not operate a railroad or coal mine, in order to show that it was within the class entitled to raise question, and this it has failed to do.

3. RECORD FAILS TO SHOW THAT THE ALLEGED UNCONSTITUTIONAL FEATURE OF STATUTE INJURES APPELLANT 21

The record fails to show that appellant must or does conduct its business in competition with natural persons in like business, or any other fact disclosing that it is injured by reason of the fact that natural persons are not included within the provisions of the act. Furthermore there is a presumption that, as an implied condition of the contract of employment between appellant and appellee, the risk of negligence of fellow-servants was assumed by appellant and not appellee.

4. THE SELECTION OF CORPORATIONS AS A CLASS FOR APPLICATION OF THE ACT IS NOT ACTUALLY AND PALPABLY UNREASONABLE AND ARBITRARY, BUT RESTS UPON FAIR AND SUBSTANTIAL DIFFERENCE 24

Corporations as a class have always presented a problem in the application of the fellow-servant doctrine. The rule as first announced relieved corporations of all liability for injury to their servants. Because of corporations certain exceptions to the rule were required, and in applying these exceptions many of the courts have dealt with corporations as a separate class. The separate classification of corporations in respect to the fellow-servant doctrine has been well and long recognized by the courts.

5. ASSUMING THAT APPELLANT MAY NOW RAISE QUESTION THAT ACT IS INVALID AS TO FOREIGN CORPORATIONS SPECIALLY, IN SPITE OF FACT THAT IT ASSIGNS ERROR SOLELY ON GROUND THAT ACT IS INVALID BECAUSE IT DENIES EQUAL PROTECTION TO ALL CORPORATIONS, SUCH GROUND IS UNAVAILING FOR IN ALL EVENTS ACT IS VALID AS TO DOMESTIC CORPORATIONS UNDER STATE'S RESERVED POWER TO AMEND CHARTERS AND FOREIGN CORPORATIONS CAN CLAIM NO GREATER RIGHT THAN IS ACCORDED DOMESTIC CORPORATIONS 61

CONCLUSION 65

Page

Table of Cases, Statutes and Texts

Albany County v. Stanley, 105 U. S. 305 12
A. L. Clark Lbr. Co. v. Johns, 98 Ark. 211 16
Aluminum Co. v. Ramsey, 222 U. S. 251 ..... 9, 10, 64
Archer Foster Co. v. Vaughan, 79 Ark. 2 46
Arkadelphia Co. v. St. Louis S. Ry. Co., 249 U. S. 134 12
Arkansas Natural Gas Co. v. Arkansas R. Comm., 261 U. S. 379 26
B. & O. R. Co. v. Baugh, 149 U. S. 368 ..... 40, 54
Baker v. Warner, 231 U. S. 588 17
Ballard v. Hunter, 204 U. S. 241 14
Ballard v. Mississippi Cotton Oil Co., 51 Miss. 507 59
Bedford Quarries Co. v. Baugh, 168 Ind. 671 ..... 56, 59
Berea College v. Kentucky, 211 U. S. 45 62
Berg v. Johnson, 139 Ark. 243 18
Blake v. McClung, 172 U. S. 239 19
Bloyd v. Railway Co., 58 Ark. 66 40
Breming v. Lippincott, 129 Ark. 406 18
Buckner v. N. Y., etc. R. Co., 49 N. Y. 672 51
Bushey v. Reynolds, 31 Ark. 657 17
Carroll v. Greenwich Ins. Co., 199 U. S. 401 56
Central Lbr. Co. v. South Dakota, 226 U. S. 157 56
Chesapeake, etc. R. Co. v. McDonald, 214 U. S. 191 10
Chicago K. & W. R. Co. v. Pontius, 157 U. S. 209 26
Chicago B. & Q. R. Co. v. McGuire, 219 U. S. 549 26
Chicago, etc. R. Co. v. Ross, 377 53
Chicago, etc. R. Co. v. Westby, 187 Fed. 619 59
Citizens Nat. Bank v. Kentucky, 217 U. S. 443 12
Cleveland, etc. R. Co. v. Keary, 3 Ohio St. 201 ..... 33, 40
Clark v. Kansas City, 176 U. S. 114 13
Consolidated Coal Co. v. Illinois, 185 U. S. 203 26
Coombs v. New Bedford Cordage Co., 102 Mass. 572 32
Cox v. Cooley, 88 Ark. 350 12
Cox v. Texas, 202 U. S. 446 10
Cravens v. State, 93 Ark. 321 12
Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129 61
Crispin v. Babbitt, 81 N. Y. 522 33
Cudahy Packing Co. v. Parramore, 263 U. S. 418 25
Cumberland, etc. R. Co. v. Moran, 44 Ind. 283 51
Darrigan v. N. Y., etc. R. Co., 52 Conn. 285 30
Dayton Coal Co. v. Barton, 183 U. S. 23 65
Espenlaub v. Hedderick, 53 Ind. A. 139 17
Farwell v. R. Co., 4 Met. 49 23
Flike v. B. & A. R. Co., 53 N. Y. 549 ..... 30, 32
Foohs v. Bilby, 95 Ark. 302 12
Fones v. Phillips, 39 Ark. 17 ..... 31, 34, 37, 38
Ford v. Fitchburg C. Co., 110 Mass. 240 32
Fort Smith Lbr. Co. v. Arkansas, 251 U. S. 532 61

	Page
Fort Smith Oil Co. v. Slover, 58 Ark. 168	44
Frazier v. Penn. R. Co., 38 Penn. St. 104	32
Frost v. Corporation Commission, 278 U. S. 515	26
Griffin v. Connecticut, 218 U. S. 563	50
Hammond Packing Co. v. Arkansas, 212 U. S. 322	61
Hardware Dealers' Mut. F. Ins. Co. v. Glidden Co., 284 U. S. 151	59
Hawkins v. Bleakly, 243 U. S. 210	25
Heald v. District of Columbia, 259 U. S. 114	12
Hendrick v. Maryland, 235 U. S. 610	15
Hooker v. Burr, 194 U. S. 415	12
Hough v. Texas Pac. R. Co., 100 U. S. 213	23, 30
Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571	26
Keammerling v. Athletic Min. & Smelting Co., 2 Fed. (2) 574	60
L. R. & F. S. Ry. Co. v. Duffey, 35 Ark. 602	31
Light v. United States, 220 U. S. 523	9
Little Miami R. Co. v. Stevens, 20 Ohio 415	33
Liverpool etc. Co. v. Commissioners, 113 U. S. 33	9, 10
Louisville & N. R. Co. v. Collins, 2 Duv. (Ky.) 114	52
Louisville & N. R. Co. v. Melton, 218 U. S. 36	21
Louisville & N. R. Co. v. Finn, 235 U. S. 601	13
Lower Vein Coal Co. v. Industrial Board, 265 U. S. 144	26
Mallinckrodt Chem. Works v. Missouri, 238 U. S. 41	12, 61
Malone v. Hathaway, 64 N. Y. 5	31, 53
Mondou v. N. Y. H. H. & H. R. R. Co., 223 U. S. 1	21
McLean v. Arkansas, 211 U. S. 539	26
Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580	27, 59
Middleton v. Tex. Pow. & L. Co., 249 U. S. 152	25, 26
Minn. & St. L. R. Co. v. Herrick, 127 U. S. 210	25
Moon v. Richmond & A. R. Co., 78 Va. 745	30
Mo. Pac. R. Co. v. Mackey, 127 U. S. 205	21, 25, 62
Mobile J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35	21
New York Central R. Co. v. White, 243 U. S. 188	25
New York ex rel. Hatch v. Reardon, 204 U. S. 152	12
New York Life Ins. Co. v. Cravens, 178 U. S. 389	65
Northern Pac. R. Co. v. Dixon, 194 U. S. 338	43, 54
Ohio ex rel. Clarke v. Deckeback, 274 U. S. 392	59
Orient Ins. Co. v. Daggs, 172 U. S. 557	65
Ozan Lbr. Co. v. Biddie, 87 Ark. 587	62
Patterson v. Pittsburg etc. R. Co., 76 Penn. St. 389	51, 52
Pembina etc. Co. v. Penn., 125 U. S. 181	64
Pittsburg etc. Ry. Co. v. Cootman, 52 Ind. A. 661	17
Plymouth Coal Co. v. Penn., 232 U. S. 531	12
Postal Tel. Co. v. White, 190 Ark. 365	8
Phillips Pet. Co. v. Jenkins, 190 Ark. 964	5
Prudential Ins. Co. v. Cheek, 259 U. S. 530	61, 65
Railway v. Barry, 58 Ark. 198	42
Railway v. Keary, 3 Ohio St. 201	52

	Page
Railway v. Gaines, 46 Ark. 555	36
Railway v. Stevens, 20 Ohio 416	52
Railway v. Torrey, 58 Ark. 217	43
Rosenthal v. New York, 226 U. S. 260	12, 64
San Bernandino Co. v. Sou. P. R. Co., 118 U. S. 417	9
Siler v. L. A. N. R. Co., 213 U. S. 175	9
Silver v. Silver, 280 U. S. 117	55, 59
Skinner v. Garnett G. M. Co., 96 Fed. 735	61
Southern Ry. Co. v. King, 217 U. S. 524	12
Southwestern Oil Co. v. Texas, 217 U. S. 114	10
Stretcher Cooperage Works v. Steadman, 78 Ark. 381	45
St. L. I. M. & S. Ry. Co. v. Harper, 44 Ark. 524	36
St. L. etc. R. Co. v. Rice, 51 Ark. 467	16, 37
St. L. etc. R. Co. v. Triplett, 54 Ark. 259	15, 38
Standard Oil Co. v. Marysville, 279 U. S. 582	59
Standard Stock Food Co. v. Wright, 225 U. S. 540	12
Sully Trustee v. American National Bank, 178 U. S. 289	19
Thomas Cusack Co. v. Chicago, 242 U. S. 526	12
Tullis v. Lake Erie & W. R. Co., 175 U. S. 348	25, 63
Turpin v. Lemon, 187 U. S. 51	12
Tyler v. Judges of Ct., 179 U. S. 405	12
Union Pacific R. Co. v. Fort, 84 U. S. (17 Wall) 553	15, 30
Union Pacific R. Co. v. Snyder, 152 U. S. 684	37
Uravic v. F. Jarka Co., 282 U. S. 234	15
Wabash R. Co. v. McNown, 53 Ind. A. 116	17
Ward & Gow v. Krinsky, 259 U. S. 503	21, 26
Watson v. Maryland, 218 U. S. 173	59
Westfall v. United States, 274 U. S. 256	59
Williams v. Walsh, 222 U. S. 415	15
Wiley v. Sinkler, 179 U. S. 58	14
Wilmington Star Min. Co. v. Fulton, 205 U. S. 60	11, 25, 26
Wolfe v. State, 107 Ark. 29	12

Text Books Cited

McKinney, Fellow-Servants, par. 4, page 4	15
4 Labatts' Master & Servant (2nd), par. 1394, page 4008	15
4 Labatts' Master & Servant (2nd), par. 1395, page 4011	28
4 Labatts' Master & Servant (2nd), par. 1471, page 4308	42
3 Labatts' Master & Servant (2nd), par. 909, page 2396	49
49 Corpus Juris, page 115	17
39 Corpus Juris, page 587	48
6 Ruling Case Law, page 100	24
18 R. C. L., Master & Servant, par. 195, page 716	30
Beach on Contributory Negligence (3rd), par. 316, page 456	29
Beach on Contributory Negligence (3rd), par. 329, page 472	51
1 Redfield on Railway, page 310	51
Wood, Master & Servant, page 860	36

Statutes Cited

C. & M. Digest, Acts of Arkansas, 1907, sec. 7137, page 163	5, 7, 8, 9
C. & M. Digest, Acts of Arkansas, 1913, sec. 7144, page 1	8, 9
Sandels & Hill Digest, Acts of Arkansas, 1893, sec. 6248	38
Sandels & Hill Digest, Acts of Arkansas, 1893, sec. 6249	38
Sandels & Hill Digest, Acts of Arkansas, 1893, sec. 6250	38
Art. 12, Sec. 6, Constitution of Arkansas	62
Art. 12, Sec. 11, Constitution of Arkansas	65

Supreme Court of the United States

OCTOBER TERM, 1935

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION ..... *Appellants,*

v. No. 386

R. O. JENKINS ..... *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR APPELLEE

THE DECISION BELOW

This is an appeal from the judgment of the Supreme Court of Arkansas rendered in the case of *Phillips Petroleum Company* v. *Jenkins*, 190 Ark. 964, denying appellant's contention that Section 7137 of Crawford & Moses' Digest of the Statutes of Arkansas, which abolished the fellow-servant rule as a defense, in so far as it applied to "all railroad companies, whether incorporated or not, and all corporations of every kind or character, and every company, whether incorporated or not, engaged in the mining of coal," denies appellant equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF CASE

The statement appearing at pages 32 to 35 of appellant's brief is a full statement of all that the record discloses. The constitutionality of this statute was not brought in question during the trial of this case, but was raised for the first time in appellant's Motion for New Trial, filed more than sixty days after the verdict and judgment. The record is, therefore, silent upon many matters which we think necessary to the determination of this question. The record fails to show whether appellant does or does not operate a railroad or a coal mine. The record does not show that appellant in the conduct of its business in Arkansas is in competition with natural persons doing a like business. The record is silent as to legislation or other local conditions in Arkansas bearing on the question. The Court is asked to say *a priori* that there could have been no distinction justifying a difference in the application of the fellow-servant doctrine as between corporations on the one hand and natural persons on the other at the time of the adoption of this statute.

ARGUMENT

1.

A DECISION ON THE VALIDITY OF SECTION 7137 OF CRAWFORD AND MOSES' DIGEST IS NOT NECESSARY TO THE DETERMINATION OF THIS CAUSE

There are two separate and distinct statutes, in force in Arkansas, abolishing (as to corporations) the defense of ~~Assembly of Arkansas in 1907 and is now Section 7137 of~~ Common Service, either of which would be applicable here.

The first of these statutes was adopted by the General Assembly of Arkansas in 1907 and is now Section 7137 of Crawford & Moses' Digest, and is the statute which appellant here alleges violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. This statute reads as follows:

> "Hereafter all railroad companies operating within this State, whether incorporated or not, and all corporations of every kind and character, and every company whether incorporated or not, engaged in the mining of coal, who may employ agents, servants or employees, such agents, servants or employees being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employee or servant, resulting from careless omission of duty or negligence or such employer, or which may result from the carelessness, omission of duty or negligence of any other agent, servant or employee of said employer, in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer."

(Act March 8, 1907, p. 163.)

The other of these statutes is a part of the Employers' Liability Act adopted by the General Assembly in 1913, and is now Section 7144 of Crawford & Moses' Digest and reads as follows:

> "Every corporation, except while engaged in interstate commerce, shall be liable in damages to any person suffering injury while he is employed by such corporation, or, in case of death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin of such employee, for such injury or death resulting in whole or in part from negligence of such corporation or from the negligence of any of the officers, agents or employees of such corporation."

(Acts 1913, p. 734, par. 1.)

Section 7144 was applied by the Supreme Court of Arkansas in the very recent case of *Postal Telegraph Company* v. *White*, 190 Ark. 365, 80 S. W. (2d) 633. An appeal to this Court was granted and the cause assigned number 145 on the docket for the October, 1935, term. The appeal was dismissed on October 14, 1935, "for the want of a properly presented Federal Question."

Reference to Section 7144 can be found at no place in the record, nor in the brief of appellant. The first time a constitutional question of any character was presented was in appellant's motion for new trial. There, the only fellow-servant statute brought in question was Section 7137 (R. 13-14). It was also alleged in the motion that Section 7145, Crawford & Moses' Digest, violated the Fourteenth

Amendment. This section is the Comparative Negligence statute, which also applies only to corporations. This question was abandoned evidently because the verdict of the jury awarded equal damages against both the corporate master and the individual servant, disclosing that the jury found appellee free of contributory negligence.

In its assignment of errors presented here appellant questions only Section 7137 (R. 98).

If Section 7137 had been repealed prior to the date of appellee's injury, Section 7144 would have applied with equal force, and the judgment here would not be different. If it were determined then that Section 7137 is unconstitutional the judgment of the State court would still be correct.

We understand the rule to be that ordinarily a decision relating to the constitutionality of a statute will be pronounced only if and when such is necessary to a determination of the controversy.

Siler v. *L. A. N. R. Co.*, 213 U. S. 175.

Light v. *United States*, 220 U. S. 523.

San Bernandino Co. v. *Sou. P. R. Co.*, 118 U. S. 417.

Liverpool, etc., Co. v. *Commissioners*, 113 U. S. 33.

Aluminum Co. v. *Ramsey*, 222 U. S. 251.

It may be argued that the two statutes are so similar that if one is unconstitutional the other is likewise.

The answer to that is that the Court will not at this time undertake to determine the validity of Section 7144, for it is the settled rule of this Court "never to anticipate

a question of constitutional law in advance of the necessity of deciding it." *Liverpool, etc., Co.* v. *Commissioners, supra.*

It is also well settled that this Court will not pass on the constitutionality of a statute until that question has first been presented to and determined by a lower court.

Southwestern Oil Co. v. *Texas,* 217 U. S. 114.

Chesapeake, etc., Ry. Co. v. *McDonald,* 214 U. S. 191.

Cox v. *Texas,* 202 U. S. 446.

2.

RECORD FAILS TO SHOW APPELLANT OF CLASS ENTITLED TO RAISE QUESTION

The question whether or not the statute under examination violates the provisions of the Fourteenth Amendment to the Constitution of the United States has once before been before this Court.

Aluminum Co. v. *Ramsey,* 222 U. S. 251.

In that case the company (as is shown by the statement of facts at 89 Ark. 522) "operated a narrow gauge railroad with a trackage of two miles which it used for the purpose of hauling the ore from the mines to the drying shed." This Court held that a corporation operating such a railroad could not challenge the validity of the act, it not being in the class which could raise the question as to discrimination between natural persons and corporations generally.

The selection by the Act, of companies operating coal mines as a class upon which to impose responsibility for

negligence of certain employees causing injury to other employees, does not, as to such companies, render the Act repugnant to the Constitution as denying equal protection of the laws.

Wilmington Star Min. Co. v. *Fulton*, 205 U. S. 60.

At page 42 of its brief, appellant concedes that the statute is valid as to corporations operating railroads or coal mines.

The record is entirely silent as to whether appellant does or does not operate a railroad or a coal mine or both.

The constitutionality of this statute was not brought in question during the trial of this cause, but was raised for the first time in the Motion for New Trial, filed more than sixty days after the verdict and judgment. Appellant offered no proof at the trial to establish the fact that it did not operate a railroad or a coal mine. It is true that the following statement appears as a part of paragraph Ninth of appellant's Motion for New trial: "* * * *it is not alleged, nor was any proof offered to show, that this defendant, Phillips Petroleum Company, was operating any railroad, nor that it was engaged in the mining of coal, and in fact it was not engaged in operating any railroad or any coal mine.*" This unverified, *ex-parte*, statement of appellant's counsel set out in the Motion for New Trial that appellant "was not engaged in operating any railroad or any coal mine" is no proof of that fact, and under the settled practice in Arkansas, the insertion of such statement in the Motion for New Trial did not make it a part of the record, nor present it for the consideration of the Court.

Cox v. *Cooley*, 88 Ark. 350.

Foohs v. *Bilby*, 95 Ark. 302.

Cravens v. *State*, 95 Ark. 321.

Wolfe v. *State*, 107 Ark. 29.

It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the Act is unconstitutional, and that the alleged unconstitutional feature injures him.

Heald v. *District of Columbia*, 259 U. S. 114.

Albany County v. *Stanley*, 105 U. S. 305, 311.

New York ex rel. Hatch v. *Reardon*, 204 U. S. 152, 160.

Citizens' Nat. Bank v. *Kentucky*, 217 U. S. 443, 453.

Plymouth Coal Co. v. *Pennsylvania*, 232 U. S. 531, 544.

Thomas Cusack Co. v. *Chicago*, 242 U. S. 526, 530.

Arkadelphia Co. v. *St. Louis Southwestern R. Co.*, 249 U. S. 134, 149.

Mallinckrodt Chem. Works v. *Missouri*, 238 U. S. 41, 54.

Tyler v. *Judges of Ct.*, 179 U. S. 405.

Southern Ry. Co. v. *King*, 217 U. S. 524, 534.

Hooker v. *Burr*, 194 U. S. 415, 419.

Standard Stock Food Co. v. *Wright*, 225 U. S. 540, 550.

Rosenthal v. *New York*, 226 U. S. 260, 271.

Turpin v. *Lemon*, 187 U. S. 51, 60.

Clark v. *Kansas City*, 176 U. S. 114, 118.

Counsel for appellant at pages 22 and 23 of their brief say as to the above cases:

> "There was no question * * * as to the burden of proof. The facts were disclosed by the record and upon the facts as they appeared from the record the complaining party was not injured by the alleged unconstitutional feature of the statute. * * *
>
> "The cases cited by appellee would be applicable here only if the record affirmatively showed that appellant was a railroad company or a company engaged in mining coal."

The above argument is directly in conflict with the plain words of the opinions cited. It is true that the cases do not directly use the words "burden of proof" but the words used are synonymous.

For instance, in the last paragraph on page 23 of their brief counsel use the words "burden" and "incumbent" as synonymous terms. They say:

> "The question here presented is where lies the burden of proof. *Was the burden upon appellee to allege and prove* that appellant was a railroad company or engaged in the mining of coal, or was it *incumbent upon appellant to allege and prove* that it was not engaged in either of those businesses?"

In the case of *Louisville & N. R. Co.* v. *Finn*, 235 U. S. 601, Mr. Justice Pitney, in reaffirming and applying the rule, uses the word "incumbent," saying:

> "* * * as has often been pointed out, it is *incumbent* upon one who seeks adjudication that a State statute is repugnant to the Federal Constitution *to show* that he is within the class with respect to whom it is

unconstitutional, and that the alleged unconstitutional feature injures him, and so operates to deprive him of rights protected by the Constitution."

While it is, of course, true that general expressions found in opinions are to be construed in light of the facts of the decided case, this does not mean that when the facts of a case require the pronouncement and application of a rule of practice, that courts should couch the rule within the limits of those facts. To do so would be stating only "half truth" which would be misleading and erroneous. In the cases *supra*, the records disclosed that the appellants were not within the class. The court was therefore required to announce a rule of practice governing this state of facts. A declaration only that "where the record discloses that appellant is not within the class he cannot be heard" would have been but a part of the true rule, and would have been a mis-statement of the rule. The question being presented, it was necessary for the court to determine the true rule, and then apply it to the facts. The true rule is not that "where the record discloses that appellant is not within the class" but rather "where the record does not disclose that appellant is within the class, the burden being on him in this regard."

There are cases which, we think, directly apply the rule, and in which relief was denied not because the record affirmatively disclosed that the one seeking relief was not within the class entitled to raise the question but because the record failed to show that he was within such class.

Wiley v. *Sinkler*, 179 U. S. 58, 67.

Ballard v. *Hunter*, 204 U. S. 241.

Williams v. *Walsh*, 222 U. S. 415.

Hendrick v. *Maryland*, 235 U. S. 610.

Counsel argue at page 24 of their brief that since it was necessary for appellee to allege and prove all facts necessary to establish his cause of action, it was incumbent upon him to allege and prove facts sufficient to bring his case within statute.

In an effort to support this argument, counsel cite several decisions which deal with causes of action which were *created by* statute.

These cases have no application here. Appellee's cause of action was not created by Section 7137 of Crawford & Moses' Digest. His cause of action against appellant is founded upon the ancient doctrine of *respondeat superior*.

> "The ancient rule of *respondeat superior* was applied *without exception* until 1837. In that year Lord Abriger decided *Priestly* v. *Fowler* and with this case begins the history of the fellow-servant rule." * * *.
>
> McKinney—Fellow Servants, par. 4, page 4.

See also:

> 4 Labatts' Master & Servant, (2nd ed.) par. 1394; page 4008.
>
> *Uravic* v. *F. Jarka Co.*, 282 U. S. 234, 240.

The fellow-servant rule is a part of the doctrine of assumed risk, being based upon the theory that the negligence of the co-servant is one of the ordinary risks incident to the employment, and is assumed by the servant.

> *Union Pac. R. Co.* v. *Fort*, 17 Wall. 553.
>
> *St. L., etc., R. Co.* v. *Triplett*, 54 Ark. 259.

St. L., etc., R. Co. v. *Rice*, 51 Ark. 467.

Under the settled rule in Arkansas assumption of risk is an affirmative defense which is not available to defendant unless specially pleaded.

A. L. Clark Lbr. Co. v. *Johns*, 98 Ark. 211.

It is clear therefore that appellee's action is not founded upon Section 7137 of Crawford & Moses' Digest. The cases declaring the fellow-servant rule provided employers an affirmative defense, the statute simply abolished this defense.

Therefore it was not necessary for appellee to allege or prove facts which brought his case within the statute or any part thereof and the cases cited by appellant have no application here.

We desire to point out, however, that in the quotation from *Chicago, I. & L. Ry. Co.* v. *Hacket* shown at page 24 of appellant's brief the court is discussing the effect of a statute which had previously been declared invalid.

It is argued, however, that since the complaint alleged that appellant was a "foreign corporation, authorized to do business in the State of Arkansas, and is engaged in the business of operating oil and gas wells, producing oil and gas and laying and operating pipe lines for the transportation of oil and gas in the State of Arkansas, and in the counties of Ouachita and Union, and at all times mentioned herein was engaged in such business" (R. 3) that such allegation was sufficient to "affirmatively show that appellant was neither a railroad company or engaged in the mining of coal." (Appellant's brief, 18.)

Pleadings, under the rules of common law, on demurrer, are construed against the pleader on the theory that it will be presumed that he has stated his case as strongly as he can.

But this rule was long since abolished in Arkansas by the adoption of the Code.

Bushey v. *Reynolds*, 31 Ark. 657.

Even under the rules of common-law pleading, a liberal construction in favor of the pleader, is adopted after verdict.

Baker v. *Warner*, 231 U. S. 588, 592, 49 Corpus Juris, 115.

"The rule that plaintiff is presumed to have stated his case as strongly as the facts warrant applies only to such facts as are necessary to constitute his cause of action, and does not apply to facts which tend to disclose a defense." Lairy J. in *Pittsburgh, etc., Ry. Co.* v. *Cootman*, 52 Ind. A. 661, 101 N. E. 22, 23. See also *Wabash R. Co.* v. *McNown*, 53 Ind. A. 116, 100 N. E. 283, *Espenlaub* v. *Hedderick*, 53 Ind. A. 139, 100 N. E. 382.

Appellant's contention, as we understand it, is that the allegation that appellant is engaged in business of operating oil and gas wells constitutes an implied admission on the part of appellee that appellant does not operate a coal mine or a railroad even of the short narrow-gauge type described in the Aluminum-Ramsey case.

Many corporations engage in various enterprises. We know of no reason why one could not operate oil and gas wells, and at the same time operate a coal mine, or even a

railroad. Many producers of oil and gas also operate refineries. It would not be unlikely that some of them find it necessary in connection with their refineries to operate small railroads just as the Aluminum Company found such necessary in the operation of its mines. So a statement that a corporation operates oil and gas wells cannot be construed as implying that it does not operate a railroad or a coal mine.

At least under the rules of pleadings prevailing in Arkansas such an allegation in a complaint cannot be erected into an implied admission that such corporation does not operate a railroad or a coal mine.

In the case of *Breming* v. *Lippincott*, 129 Ark. 406, 411, Mr. Justice Humphreys announces the rule for construction of pleadings with reference to implied admissions as follows:

> "It is insisted, however, * * * that the reply and first amendment * * * was a solemn admission * * *.
>
> "Under the rule insisted upon by appellant, the plea must be an *unequivocal admission of facts*, which, if true, precludes recovery."

Although the above case is not cited, the same rule is applied in the case of *Berg* v. *Johnson*, 139 Ark. 243, 249, in which case it was further held that an implied admission in the complaint not necessary to plaintiff's cause of action is not binding on plaintiff in so far as it relates to an affirmation defense, the court at page 250 of the report saying:

> "The allegation in the complaint with respect to the unlawful possession of appellee for two years be-

fore the commencement of the action was not necessary, so far as the length of time of said possession was concerned, to a statement of appellant's cause of action for the recovery of the land, and was included merely for the purpose of setting forth the facts upon which a recovery of the rents and profits could be based. On the trial of the action it would operate as an admission on the part of appellant as to the length of time appellee has been in possession, but she is not conclusively bound by the allegation so far as it relates to appellee's plea of the statute of limitations."

The case of *Sully Trustee* v. *American National Bank*, 178 U. S. 289, relied on by appellant is not in point. This is a companion case with *Blake* v. *McClung*, 172 U. S. 239, and the two should be read together.

The facts of those cases show that the Chancery Court of Washington County, Tennessee, had taken charge of the assets within the State of Tennessee of an insolvent foreign corporation, to administer the same for the benefit of creditors, in accordance with and under the provisions of an insolvency statute of the State of Tennessee.

This statute provided that in the distribution of the assets, creditors who were "residents" of Tennessee should have priority over "residents" of other states.

In the McClung case, Mr. Justice Harlan, at page 247 of the report, says:

"Looking at the purpose and scope of the Tennessee statute, it is plain that the words 'residents of this State' refer to those whose residence in Tennessee was such as indicated that their permanent home or habitation was there, without any present intention of removing therefrom, and having the intention, when

> absent from that State, to return thereto; such residence as appertained to or inhered in citizenship. And the words in the same statute, 'residents of any other country or countries' refer to those whose respective habitations were not in Tennessee, but who were citizens, not simply residents, of some other State or country."

During the pendency of the general suit Carhart intervened alleging that he was a "resident" of the State of New York.

The decision of this court holding that it was sufficiently established that he was a "citizen" of New York, holds only that since his allegation being in the words of the statute under which the proceeding was authorized, that the words in his pleading would be given the same construction as the same words in the statute.

This decision is but the application of the general rule that on appeal pleadings are to be construed in favor of the pleader, and that he shall be given the benefit of all inferences which may reasonably be drawn therefrom.

In the case at bar appellant is not seeking a liberal construction in its favor of its own pleadings—it is seeking liberal construction in its favor and a strict construction against appellee of appellee's pleading.

The suggestion found at page 20 of appellant's brief that the name "Petroleum Company" negatives the idea that it operates a railroad or coal mine, hardly requires answer. Aluminum Company no more suggests one of these facts than does Petroleum Company—yet such a company operated a railroad. So too did a company bearing the name Minnesota Iron Company, 199 U. S. 593.

The fact that appellee at the time of his injury was not employed in the operation of a railroad or the mining of coal, is not material, since the test is whether or not appellant operates a railroad or a coal mine, the statute making such companies liable to employees of all classes and in all departments without respect to hazard, and this fact does not render the act invalid.

Louisville & Nashville R. R. Co. Co. v. *Melton*, 218 U. S. 36;

Mondou v. *N. Y. H. H. & H. R. R. Co.*, 223 U. S. 1;

Mo. Pac. R. Co. v. *Mackey*, 123 U. S. 205;

Mobile J. & K. C. R. Co. v. *Turnipseed*, 219 U. S. 35;

Ward & Gow v. *Krinsky*, 259 U. S. 503.

3.

RECORD FAILS TO SHOW THAT THE ALLEGED UNCONSTITUTIONAL FEATURE OF STATUTE INJURES APPELLANT.

Not only was it incumbent upon appellant to show that it was of a class entitled to raise the question, but, as is stated in all of the cases quoted and cited in the section next above, the burden rested upon appellant as a condition precedent to its right to question the constitutionality of the statute, to show that the alleged *unconstitutional feature* of the statute injures it.

The record here does not show any injury to appellant by reason of the "alleged unconstitutional feature of the statute." True it may show injury by reason of the statute itself—that is to say that perhaps but for the statute

appellant may not have been held liable in this case. But that liability is on account of the statute, and not on account of the "alleged unconstitutional feature" thereof. The "alleged unconstitutional feature" here complained of is that the statute unjustly discriminates between corporate employers, and individual employers. Appellant contends that the statute should apply to both. If the statute had applied to both at the time of the injury of appellee, appellant would have been subject to the same liability, and the judgment against it would have been no different. So it is readily seen that in so far as the judgment here is concerned, it is not the "alleged unconstitutional feature" of the statute which makes it possible—it is the statute itself.

We can conceive of a state of facts which might be sufficient to establish injury by reason of the "alleged unconstitutional feature" of the statute.

Appellant might have shown at the trial, that in the conduct of its business in Arkansas it had to compete with individuals and partnerships also engaged in the business of producing, saving and marketing oil; that it was forced by economic conditions to sell its oil in the same market, and at the same price as such individual operators; that by reason of the burden placed on it by the statute, its cost of producing such oil was greater that the cost to individual operators, thus making it impossible for appellant to compete on an equal footing with these individual operators.

No such suggestion appears in the record. For aught the record shows to the contrary there is not an individual or a-partnership engaged in the business of producing, sav-

ing and marketing oil within the boundaries of the State of Arkansas.

There is yet another reason why, we think, appellant has failed to show that it is injured by reason of the "alleged unconstitutional feature" of the statute.

It is to be remembered that the basis for the fellow-servant doctrine as disclosed by Chief Justice Shaw in *Farwell* v. *R. Co.*, 4 Met. 49; and quoted with approval by Mr. Justice Harlan in *Hough* v. *Texas and Pacific Railroad Co.*, 100 U. S. 213, 25 L. E. 612, is:

> "The general rule resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services; *and, in legal contemplation, the compensation is adjusted accordingly.* And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is likely to know, and against which he can effectually guard, as the master. They are perils incident to the service, and which can be distinctly foreseen *and provided for in the rate of compensation as any other.*"

Since, therefore, prior to the adoption of the statute, there was the presumption that the servant received additional compensation to justify the assumption of the risk from the negligence of his fellow-servants (which presumption still applies as between individual masters and their servants) why is there not now just the opposite presumption; that in the contract of employment of a servant by a

corporation, the servant's compensation is fixed in a reduced rate, the difference being the compensation to the corporation for assuming responsibility, towards the servant, for negligent acts of the corporation's agents, who will be fellow-servants of the person then being employed? We think such a presumption of law does in fact exist.

Especially is it true in view of the well-established rule that every reasonable presumption must be first indulged in, in favor of the validity of a statute.

6 Ruling Case Law 100.

It is, therefore, to be presumed that at the time of the contract of employment made between Jenkins and appellant that the agreed compensation was fixed at a rate below that usually paid by individual employers to their servants for doing the same class of work, and that such difference in the rate of pay was intended as compensation to appellant, for its agreement to indemnify Jenkins for injury caused by the negligence of his fellow-servants.

If it had received the consideration for its contract, how then can it say that it is injured by reason of being required to perform the obligations assumed by it therein?

4.

THE SELECTION OF CORPORATIONS AS A CLASS FOR APPLICATION OF THE ACT IS NOT ACTUALLY AND PALPABLY UNREASONABLE AND ARBITRARY, BUT RESTS UPON FAIR AND SUBSTANTIAL DIFFERENCE.

Assuming that appellant had shown itself to be within the class entitled to raise the question, and that it had es-

tablished injury on account of the "alleged unconstitutional feature" of the act, still we submit that the act would not be in conflict with the Fourteenth Amendment.

This Court has frequently held that statutes abrogating or modifying the fellow-servant rule are a proper exercise of the police power of the states, and do not violate the due process clause of the Fourteenth Amendment.

Missouri Pacific v. *Mackey*, 127 U. S. 205;
Minn. & St. L. R. Co. v. *Herrick*, 127 U. S. 210;
Tullis v. *Lake Erie & W. R. Co.*, 175 U. S. 248;
Wilmington Star Min. Co. v. *Fulton*, 205 U. S. 60;
Cudahy Packing Co. v. *Parramore*, 263 U. S. 418;
New York Central R. Co. v. *White*, 243 U. S. 188;
Hawkins v. *Bleakly*, 243 U. S. 210;
Middleton v. *Tex. Pac. & L. Co.*, 249 U. S. 152.

It has also been held that in the exercise of this power the states may within certain limits apply such statutes to certain classes of employers and employees, and not to others. Such statutes have been held not to violate the equal protection clause of the Fourteenth Amendment when they apply to

1. Railroad Corporations, but not to natural persons operating railroads, or to other corporations and natural persons generally.

Missouri Pacific Ry. Co. v. *Mackey*, 127 U. S. 205;
Minn. & St. L. R. Co. v. *Herrick*, 127 U. S. 210;
Tullis v. *Lake Erie & W. R. Co.*, 175 U. S. 348;

Chicago K. & W. R. Co. v. *Pontius,* 157 U. S. 209;

Chicago B. & O. R. Co. v. *McGuire,* 219 U. S. 549.

2. Mine Owners and Mining Companies, but not to other employers generally.

Wilmington Star Min. Co. v. *Fulton,* 205 U. S. 60;

Lower Vein Coal Co. v. *Industrial Board,* 255 U. S. 144.

3. Employers working a certain number of men or more (as low as five or more) and not to employers working a less number.

Consolidated Coal Co. v. *Illinois,* 185 U. S. 203;

McLean v. *Arkansas,* 211 U. S. 539;

Jeffrey Mfg. Co. v. *Blagg,* 235 U. S. 571;

Middleton v. *Texas P. L. R.,* 249 U. S. 152;

Ward & Gow v. *Krinsby,* 259 U. S. 503.

The selection of corporate employers, as a distinct class rests upon a fair and substantial difference between corporations on the one hand and natural persons on the other in respect to this common law rule.

In the case of *Frost* v. *Corporation Commission,* 278 U. S. 515, 73 L. E. 483, 488, it is said:

> "Immunity to one from a burden imposed upon another is a form of classification and necessarily results in inequality; but not necessarily that inequality forbidden by the Constitution. The inequality thus prohibited is only such as is actually and palpably unreasonable and arbitrary. *Arkansas Natural Gas Co.* v. *Arkansas R. Commission,* 261 U. S. 379, 384, 67 L. E. 705, 710, 43 Sup. Ct. Rep. 387, and cases cited." 73 L. E. 488.

A very recent case dealing with the question is *Metropolitan Casualty Insurance Co.* v. *Brownell,* 294 U. S. 580, 584.

There, as here, the record was silent as to legislation or other local conditions * * * "bearing on the question," but, as here, the court was "asked to say *a priori* * * * that there can be no reasonable basis for the legislative judgment." Mr. Justice Stone there said:

> "It is a salutary principle of judicial decision, long emphasized and followed by this court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it."

Not only does the record here fail to "make known" any fact indicating that the classification is unreasonable and arbitrary, but also those facts which may be "generally assumed" by this court as matters of judicial notice not only fail to preclude the assumption that the classification rests upon some rational basis, but on the contrary justify the conclusion that such classification rests upon a fair and substantial difference.

A study of the history of the fellow-servant doctrine, as it was developed by the many decisions of the American Courts, shows clearly that *Corporations as a class* have

presented perplexing problems peculiar to themselves, in the application of the rule.

It was soon discovered that the application of the original rule in unmodified form would have the affect of relieving corporations from all liability. In an effort to meet this situation certain exceptions to the rule were adopted by the courts. Some of the decisions indicate that certain of these exceptions were intended to apply only to corporations, although such was not the weight of authority. Certain it is, however, that the exceptions were adopted to meet the problem presented by corporations, and there were those who argued that the rule should not apply to corporations at all, or if so, then differently than to individuals and partnerships.

Mr. Labatt in his work on Master and Servant says:

> "The chief influence which has operated in producing this more liberal tendency of judicial opinion has probably been the fact that industrial enterprises have in modern times been falling more and more into the hands of corporate bodies. The harsher aspects of the doctrine of common employment have naturally been brought into clearer relief by this economic situation."
>
> 4 Labatt's Master & Servant, (2d ed.) par. 1394, page 4011.

Mr. Beach in his work on Contributory Negligence, referring to the fellow-servant doctrine, says;

> "Moreover, this question of public policy and general convenience was decided for us in the very infancy of the great corporate interests of the country, when railways were an experiment, and powerful private corporations had not been born. What was sound

public policy before the middle of the century, even if it be conceded that the judges of half a century ago divined it aright, when *Priestley* v. *Fowler* and *Murray* v. *South Carolina R. Co.* were decided, may, in view of the extraordinary change in position as regards employer and employee, reasonably be challenged in 1892. It is quite possible that what was good public policy, then, is not policy in any sense now."

Beach on Contributory Negligence, (3rd ed.) par. 316, page 456.

A short but enlightening discussion of this problem, and the efforts of the courts to solve it is found in Ruling Case Law, where it is said:

"Hardly had the doctrine of fellow service come into general recognition than it became apparent that rapidly changing economic conditions rendered it impolitic—at least in unmodified form. The doctrine was the product of the economic ideals that during the latter half of the nineteenth century sacrified much to commercial interests, and to these same ideals we owe the development of the *corporation* and the enlargement of the sphere of activity of corporate bodies. *The question thereupon arose whether there should be a logical extension of the doctrine to these corporations. If they were to be exonerated from liability for injuries to their employees on the score of fellow service it followed that they could be liable in no case, inasmuch as they must need act and perform their functions through individuals who have a common employer.* Changed ideals dictated a modification of the doctrine. While some courts have protested that the rule in question is too firmly fixed in jurisprudence to be reversed or seriously modified by judicial decision, a great majority, being of the opinion that it works an injustice in its application to the great enterprises of the present day, have been astute to engraft upon it so many

modifications and qualifications that little is left of its original import. *It has been said that the courts have been 'put to mighty labor and bother to administer old rules in the light of changed conditions and to put new wine of interpretation in the old bottles of the law —all with a semblance of preserving it from chaos or radical change.'* The first of the qualifications of the doctrine to be generally recognized was the rule relating to the competency of co-employees. This seems to have satisfied requirements for a considerable time, but still further changes in economic conditions and public policy have dictated the principles of nondelegable duties, superior and inferior employees, and, more recently, different departments."

18 R. C. L. Master & Servant, par. 195, page 716.

A few of the leading cases which point out that the application of the fellow-servant doctrine in unmodified form would have the affect of relieving corporations of all liability are:

Union Pacific R. R. Co. v. *Fort*, 84 U. S. (17 Wall) 553.

Hough v. *Texas & Pac. R. Co.*, 100 U. S. (10 Otto) 213.

Moon v. *Richmond & A. R. Co.*, 78 Va. 745.

Fieke v. *B. & A. R. Co.*, 53 N. Y. 549.

Darrigan v. *N. Y., etc., R. Co.*, 52 Conn. 285.

Since the effect of the original rule was to relieve corporations of all liability for injury to their servants, it certainly would have been proper at that time, and before its modification, for legislative bodies to have denied corporations the benefit of the rule.

It is proper, therefore, to determine whether or not in 1907 when this statute was adopted, the decisions of the Supreme Court of Arkansas had so modified the original rule as to completely eliminate the difference in liability under the original rule between corporate and personal masters.

The "Competent Servant" exception was recognized in the first case in Arkansas. *L. R. & F. S. Ry. Co.* v. *Duffey*, 35 Ark. 602, 613.

In the next case considered (*Fones* v. *Phillips*, 39 Ark. 17) the "non-delegable duty exception" is recognized as applying to both personal and corporate masters. In thus applying this exception to both personal and corporate masters the Arkansas decision is in accord with the overwhelming weight of authority, but it is interesting to note that at least one court of recognized authority had prior to the decision in *Fones* v. *Phillips*, recognized even in the application of the "non-delegable duty exception" a distinction between corporations and personal masters who had not surrendered complete control of the entire business to an agent. That was the Court of Appeals of New York in the case of *Malone* v. *Hathaway*, (1876) 64 N. Y. 5.

In that case a servant employed by a partnership operating a brewery, was killed by reason of the falling of a mashtub on account of the giving away of rotten timbers supporting it. The partners had delegated to a competent carpenter the duty of keeping the premises in repair. The case was tried on the theory that such agent was negligent in this regard. The court denied judgment, Mr. Justice Allen saying:

"Corporations necessarily acting by and through agents, those having the superintendence of various departments with delegated authority to employ and discharge laborers and employees, provide materials and machinery for the service of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representative of the corporation charged with the performance of its duty, exercising the discretion ordinarily exercised by principals, and within limits of the delegated authority the acting principal. These acts are in such case the acts of the corporation for which, and for whose neglect, the corporation within adjudged cases must respond, as well to the other servants of the company as to strangers. They are treated as the general agents of the corporation in the several departments committed to their care. *Wright* v. *N. Y. C. R. R. Co., supra; Frazier* v. *Penn. R. Co.*, 38 Penn. St. 104; *Laning* v. *N. Y. C. R. R. Co.*; and *Filke* v. *B. & A. R. R. Co., supra; Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572; S. C., 3 Am. Rep. 506; *Ford* v. *Fitchburg C. Co.*, 110 Mass. 240; S. C., 14 Am. Rep. 598. A person thus placed by a corporation, in such a position of trust and authority, may be fairly considered as its representative *pro hac vice*. But when the principal is an individual acting *sui juris*, and there is no evidence of surrender of power and control to any subordinate, and is present himself superintending the establishment in person, no such presumption arises, or responsibility attaches in respect of the acts of a competent and proper foreman, selected by and in the employment of the principal."

It will be seen, therefore, that from a very early date corporations have been treated as a separate class in the application of the fellow-servant doctrine.

While prior to the adoption of the statute of 1907, the Supreme Court of Arkansas had recognized the "competent

servant exception" and also the "non-delegable duty exception" it had definitely rejected the "separate department exception" (*Triplett* v. *Railway,* 54 Ark. 289), and as we interpret the decisions had also rejected the "superior servant exception," holding that the master was liable for the acts even of vice principals only in connection with the breach of a non-delegable duty.

There is an irreconcilable confusion not only between the decisions of the various states, but often between different decisions of the same state upon the "superior servant exception," and there are almost as many variations and shadings of the rule as there are decisions. In the main, however, the decisions may be grouped in three general classes, as follows:

1. Where the rule is rejected, and the liability of the master for the acts of his agents, of whatever rank, is held to be exactly commensurate with the positive duties of the master. This is sometimes designated, and we shall hereafter refer to it as the New York Rule because the case of *Crispin* v. *Babbit,* 81 N. Y. 522, is a leading exponent of the rule.

2. Where it is held that the master is under duty to superintend and control the work, and negligence in this regard committed by any person superior to and directing a subordinate is the negligence of the master. This is often designated, and we shall hereafter refer to it as the Ohio Rule, because it was first announced in that state in the cases of *Little Miami R. Co.* v. *Stevens,* 20 Ohio 415, and *Cleveland C. & C. R. Co.* v. *Keary,* 3 Ohio St. 201.

3. Where the master is held liable for all acts of one who stands in the position of vice principal, as the directing head of the master's business, or a separate and distinct department thereof; but liable for acts of superior servants of lower rank only with respect to the breach of a positive duty of the master. This rule has sometimes been called, and we shall hereafter refer to it as, the vice principal rule, and is the rule which was finally adopted by the Supreme Court of the United States.

Although statements may be found in some of the opinions which could be construed as applying either of the last two of the rules mentioned above, we believe that a consideration of the Arkansas decisions as a whole justifies the conclusion that at the time of the adoption of this statute the New York rule was in effect in Arkansas. As a matter of fact it would not require strained construction of the decisions to reach the conclusion that the Arkansas rule was even stricter than the New York rule; that is to say that like under the New York rule a master could only be liable for the breach of a positive duty—but in addition to that rule the further condition was imposed that such breach of a positive duty must be the act of one who occupied the position of vice principal.

Fones v. *Phillips* (1882) 39 Ark. 17, was the first case dealing with the question. In that case the court recognizes the "non-delegable duty" exception, but it specifically rejects the "vice-principal or superior servant" exceptions, in unmistakable language.

Since this decision is cited with approval in nearly all of the subsequent cases, some of which may appear to be

consistent with the "superior servant exception" we take the liberty of quoting from it at length. At page 26 of the report Mr. Justice Eakin says:

> "Indeed the English and American cases are not easily reconcilable. The former go to the extent of holding all to be fellow-servants, within the rule, who are engaged in the prosecution of the same business, under the same master, and receiving wages from the same source, *however different the grades of their services may be, and however the labor of some may be under the direction and control of others, unless the master has transferred all his authority to the servant guilty of the negligence.* The American cases present less uniformity, and in some of them it has been held that a superior employee, intrusted with the control of inferiors, although himself an employee, may so represent the master and stand in his place, as to make him answerable for negligence to persons injured thereby, although the master may retain general authority over all. In the language of *Mr. Wharton,* who cites the cases in the notes to *section* 235 of his work on *Negligence,* 'the liability of the master for the middle-man's negligence, has been pushed so far as to make the master liable to a servant for all injuries inflicted by fellow-servants who were in a position superior to, or beyond the influence of the injured party.'
>
> "Upon the examination of a number of these cases, we think with Mr. Wharton, that the line of distinction between the cases where the employer is liable to an employee for injury resulting from negligence of a fellow-workman, and those where he is not, can be traced along this principle. *That is that the general rule is recognized here as in England, but that 'where a master is required to perform specific duties to his servants, he is liable for negligence in the discharge of such duties, no matter who may be the agents through whom he acts.*"

The learned Justice then reviews at length some of the leading American cases including those adopting the so-called "New York Rule" and those following the so-called "Ohio Rule" together with the comments of many text-writers, and adds:

> "*Mr. Wood* in his work on *Master and Servant, page* 860, extracts from all the cases, the following rule: 'Whenever a master delegates to another the performance of a duty to his servants, which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent, and to the extent of the discharge of these duties by the middleman, he stands in the place of the master; *but as to all other matters, he is a mere co-servant*, and the question is not whether the master reserved oversight and discretion to himself, but whether he did in fact clothe the middle-man with power to perform his duties to the servant injured.' This seems to us to embrace all the conditions under which, by the current and superior weight of authority, the master has been held liable for the acts of negligence of one employee, by which another has been injured."

Fones v. *Phillips* was cited with approval in the case of *St. L. I. M. & S. Ry. Co.* v. *Harper* (1884) 44 Ark. 524, where it was held that a corporation was liable for negligence of its master mechanic and shop foreman in failing to discharge the non-delegable duty of the master to properly inspect and repair a defective boiler.

Railway v. *Gaines* (1885) 46 Ark. 555, held that a brakeman and car inspector were fellow-servants, and the former could not recover for injury received by reason of a defective draw head, which it was alleged was not dis-

covered by reason of the want of proper inspection on the part of the car inspector. There can be no doubt that it was one of the positive duties of the master to make suitable inspection to discover this defect. *Union Pacific R. Co.* v. *Snyder*, 152 U. S. 684. Notwithstanding this fact recovery was denied on the ground that the car inspector was not the head of a department. It would seem, therefore, that this decision further narrowed the rule of *Fones* v. *Phillips* and established the rule that a master was liable only for the breach of a non-delegable duty, and then only where the neglect of such duty was the act of a general agent of the company in charge of a separate department or larger division of the master's business.

This narrow rule was re-affirmed in the case of *Railway* v. *Rice* (1888) 51 Ark. 467, 480, *where the court said:*

> "While we recognize the liability of the railway company for the willful or negligent default of its chief inspectors, and those deputed to supervise the condemnation of unsuitable tools, rolling stock, etc., we cannot assent to the proposition that every yard inspector on the line of a railroad is a vice principal. Upon what we conceive to be the soundest principles, and the weight of authority we hold that the appellee and the yard inspector were fellow-servants, and hence that appellee had no cause of action against the appellant."

This language shows clearly that the rule of the court at that time was that the master was liable for the negligence of a head of a department only in respect to a positive duty of the master, and for the negligence of an agent of a lesser rank not at all.

Railway v. *Triplett* (1891) 54 Ark. 289, seems to return to the doctrine of *Fones* v. *Phillips,* and holds that the liability of a master for the acts of his agents of whatever rank or grade "is precisely commensurate with the master's personal duties." At page 297 the court quotes with approval a statement of Judge Dillon as follows:

> "The real inquiry is: *Was the injury caused by another servant one of the ordinary risks of the particular employment?* If so, the mere grade, whether higher, lower or coordinate, or the department of the faulty servant, is of no consequence.
>
> "It is a condition of contract of service that the servant takes upon himself the risk of accidents in the *common course of the business,* all open and palpable risks, including the negligence of all fellow-servants of whatever grade in the same employment.
>
> "The true inquiry in each case, is: Was the accident one of the normal and natural risks in the ordinary course of business? If so, then there is no common law liability on the part of the employer; if not, there is such liability; and the inquiry, except as it bears on the above, is not one of grades or departments. This is the final form the doctrine has assumed, and it is the correct one. It is plain, intelligible and practical. It is founded upon just principles, *viz.,* that it is *precisely commensurate with the master's personal duties.*"

The General Assembly of Arkansas, at its 1893 session, no doubt, taking cognizance of the decision in *Railway* v. *Triplett* denying both the superior servant and the separate department exceptions, adopted a statute, declaring these exceptions, in so far as railway corporations were concerned. This was the Act of February 28, 1893, which was later carried into Sandels & Hill Digest of the Statutes

of Arkansas, and appeared as sections 6248 to 6250 thereof. This statute reads as follows:

"6248. All persons engaged in the service of any railway corporation, foreign or domestic, doing business in this State, who are entrusted by such corporation with the authority of superintendence, control or command of other persons in the employ or service of such corporation, or with the authority to direct any other employee, in the performance of any duty of such employee, are vice-principals of such corporation, and are not fellow-servants with such employee.

"6249. All persons who are engaged in the common service of such railway corporations, and who, while so engaged, are working together to a common purpose, of same grade, neither of such persons being entrusted by such corporations with any superintendence or control over their fellow employees, are fellow-servants with each other; *provided,* nothing herein contained shall be so construed as to make employees of such corporation in the service of such corporation fellow-servants with other employees of such corporation engaged in any other department or service of such corporation. Employees who do not come within the provisions of this section shall not be considered fellow-servants.

"6250. No contract made between the employer and employee based upon the contingency of the injury or death of the employee limiting the liability of the employer under this act, or fixing damages to be recovered, shall be valid and binding."

Several cases which involve causes of action accruing before, but which were not decided until after the adoption of the statute, are to be found in Vol. 58 of the Arkansas Reports.

The first of these cases is *Bloyd* v. *Railway Company*, 58 Ark. 66. Here a servant was employed in a crew of bridge repairers, in charge of one Munden, who had control over the bridge crew, and who also had control of the crew operating a work train used in connection with the work. Bloyd in the discharge of his duties was directed by Munden to go across the trestle, and while he was doing so Munden directed the train to move forward, and the injury resulted.

Classification of this decision is difficult. In it may be found language indicating persuasion in favor of the Ohio Rule; again it deals with the question as if it were applying the vice principal rule of the Supreme Court of the United States, but it finally returns to the New York Rule and holds that the negligence was in respect to a positive duty of the master.

While the court cites *Cleveland etc R. Co.* v. *Keary*, 3 Ohio St. 201, and other cases which adopt the Ohio Rule, it does so only in support of its declaration that the distinction between a vice principal and a mere foreman depends not upon the extent and magnitude, but rather upon the nature of the work of which the offending servant has charge.

The court then refers to the ruling in the case of *B. & O. R. Co.* v. *Baugh*, 149 U. S. 368, which held, that in order for one to be a vice principal he must be "clothed with control and management of a distinct department," and applying that rule the court says: "Munden had charge of such work as might well be called a separate branch of defendant's business."

The court then says:

> "It is held, however, in the Baugh case that the question as to a master's liability to his servant for the negligence of another servant does not turn merely on the matter of subordination and control, but depends rather on whether the act of alleged negligence is done in discharge of some positive duty of the master to his servant."

It will be seen, therefore, that the decision rests finally upon the ground that the injury was the result of negligence in respect to a positive duty of the master.

That the court had no intention of overruling or modifying the established rule of *Fones* v. *Phillips* is clearly shown by the fact that such case is cited in the outset of the opinion as authority for the following statement.

> "* * * the material question is whether Munden was a mere foreman, overseeing a gang of laborers, or was an agent of the company, clothed with its authority in the management and supervision of such part of its business as to make him the company's representative. If he occupied the former position, the laborers had assumed the risk of his negligence; but in the latter case he was a vice-principal, and if he was guilty of negligence *in that capacity* the company is liable."

The words "in that capacity" taken in connection with the citation of *Fones* v. *Phillips* have peculiar significance, for it was pointed out in the former case that one is acting only in the capacity of a vice principal when he is discharging a positive duty of the master.

It may be that what was there declared to be a non-delegable duty would not be so considered by many of the courts, although it appears to us that the facts of the case

present a situation where there was a failure to protect the servant against the happening of an occurrence which exposed him to an extraordinary transitory peril against which the servant had no means to guard himself, and which Mr. Labatt says "may well be regarded as a form of the non-assignable duty to furnish and maintain a safe place of work. (4 Labatt's Master & Servant (2d ed.) par. 1471, page 4308). But even if the court was in error in holding that Munden was performing a positive duty of the master, this would be only a mis-application of the rule, and in no sense an abandonment of the rule.

There is reason for the belief that in this case the Court was returning to the stricter rule of *Railway* v. *Gaines, supra,* for the court seems to have considered it necessary to find not only that there was a breach of a non-delegable duty, but that such was the result of negligence of a vice principal—and it did find that each condition had been met by the evidence.

If the decision in the Bloyd case could be said to indicate abandonment of the prior rule, later cases show clearly that such was not the intention of the court.

In *Railway* v. *Barry,* 58 Ark. 198, 204, it is said:

> "Under the circumstances of this case, the movements of the trains being under the direction and control of the train dispatcher, in directing and controlling their movements he was *performing the master's duty,* and was not a fellow-servant with the plaintiff, but the representative of the company, for whose negligence, if any, resulting in injury, the company is liable."

That in directing the movements of trains the train dispatcher is performing a positive duty of the master cannot be doubted. Mr. Justice White, dissenting, in the case of *Northern Pacific R. Co.* v. *Dixon,* 194 U. S. 338, 352, says:

> "Indeed, elaboration to show that a train dispatcher * * * in the discharge of his functions, performs a positive duty of the master, is unnecessary, since the opinion of the court in this case proceeds upon the assumption that such is the case."

In the case of *Fordyce* v. *Briney,* 58 Ark. 206, 213, Mr. Justice Mansfield, who also wrote the opinion in the *Bloyd case,* says:

> "On the first of these questions, the fourth instruction of the court was to the effect that 'if it was the duty of the plaintiff, as car repairer, to work under the authority and control of the car inspector,' and he was so working at the time he was injured, then the car inspector was not his fellow-servant. This was error. There was no evidence that Hickey, the car inspector, sustained to the car repairers any relation other than that of a mere foreman directing their labors; and the possession of such authority as that implied did not make him the representative of the defendant. *Fones* v. *Phillips,* 39 Ark. 39; *Bloyd* v. *Railway Co., ante* p. 66. The first clause of the sixth instruction is equally objectionable, on the same ground. *And in this connection it is proper to say that there was no evidence tending to show that Hickey was charged with the duty of performing any act looking to the safety of the place where the plaintiff was directed to work.*"

Again in the case of *Railway Company* v. *Torrey,* 58 Ark. 217, 227, Mr. Justice Mansfield says:

> "As already indicated, we are not prepared to hold that the court was right in assuming that there

was evidence from which the jury might have found the existence of facts sufficient to make the foreman a vice-principal. Conceding, however, for the purposes of this opinion, that there was such evidence, the fourth instruction was not in other respects correct. It told the jury that the plaintiff was entitled to recover if it was shown that he was negligently and carelessly ordered 'by the foreman to a dangerous position, and that while occupying that dangerous position, and by reason thereof and said order, he was injured, while he himself was exercising due care.' This was too general. The court should have stated, as far as it was practicable to do so, the facts, which, if proved, would make the order negligent; *and these facts must have been such as involved a failure to perform some duty which the defendant company owed to the plaintiff as its servant.*"

The case of *Fort Smith Oil Co.* v. *Slover*, 58 Ark. 168, declares it to be one of the master's positive duties to instruct and warn an inexperienced servant of hidden dangers, and adds:

> "If Burke had the power to employ and discharge laborers in his department, and he was the foreman in his department, *the duty of the master to instruct, if he owed that duty to Slover, devolved on Burke.*"

The judgment in the case of *Railway Company* v. *Hammond*, 58 Ark. 324, was reversed on the ground that the evidence did not support the specific acts of negligence alleged. There a servant employed in a rock quarry, and at the time on a hand car was run over and killed by a freight train, the three grounds of negligence were (1) failure to notify the superintendent of the quarry of the running of the train (2) negligence of the engineer in not sounding the whistle (3) negligence of the superintendent in placing the

servant on the hand car. The court found that the company was not negligent in any of these particulars, but the record suggested that there might have been negligence in failing to put out flag signals so as to notify the engineer of the presence of the car on the track, and leave was granted to the plaintiff to amend his complaint. If there was a duty to put out these signals it was unquestionably the duty of the master since it is a part of the non-delegable duty to furnish and maintain a safe place to work.

All but two of the cases considered by the court involving an injury occurring after the statute of 1893, and before the Act of 1907 were railroad cases, and controlled by the prior statute.

One such case is *Stretcher Cooperage Works* v. *Steadman*, 78 Ark. 381, decided April 16, 1906. Here a servant was killed by the sudden bursting of a fly wheel. The court without citing any authorities or giving any explanation for its decision disposes of the question in these brief words:

> "The evidence does not clearly show what was the cause of the accident. There was some evidence tending to show that it was caused by running the machine at too high a speed. It is also possible that the wheel may have been slightly out of balance, but this is by no means clear. If the accident was due to the fact that the machinery was through carelessness of the foreman of defendant run at great and unusual speed, or to the fact that through the carelessness of the foreman the wheel was being operated while it was out of balance, then the company would be liable, for we see nothing in the evidence tending to show that Steadman was guilty of contributory negligence, and he did not assume any risk due to the negligence of the foreman of the company, who was not his fellow-servant."

Admitting, as we must, that this decision is far from satisfactory, and considered alone would leave the rule in doubt, yet since it did not expressly overrule the prior decisions, it must, if possible be construed in harmony therewith. The duty to exercise due care to maintain the wheel in balance was, of course, a positive duty of the master. The operation of the machinery at a high and dangerous speed, if only a temporary condition, might properly be a mere detail of the work, and the act of the foreman, on the other hand if the speed was the usual and customary speed at which the machinery was continually operated, by the order of, or with the implied consent of the master then it constituted a method of work and was the master's act. Then too under the doctrine that it is the positive duty of the master not to expose his servants to extraordinary peril, the court might have found that in this case where a wheel was out of balance the duty rested upon the master to determine the maximum speed at which it should be operated, and that duty at the time being discharged by the foreman he was performing the act of the master.

A case decided only a few months prior to the adoption of this statute shows clearly that the rule in Arkansas was that a master was liable for the negligence of a vice principal only in respect to a positive duty.

Archer Foster Con. Co. v. *Vaughn* (May 7, 1906) 79 Ark. 20, 23, was a case where a servant engaged in a dynamite crew, under the direction of one Lynch as superintendent, who not only directed the men but personally placed the dynamite in the holes, was injured by an explosion of dynamite which had been placed in a hole by Lynch. Mr. Justice Wood says:

> "* * * there was evidence to justify the conclusion that Lynch was vice-principal of the appellant. * * * Now, the labor of drilling and of loading dynamite in the holes and of blasting same was all to a common purpose, and all who were engaged therein were fellow-servants. * * * This would include Lynch, the vice-principal, while he was doing the labor of drilling or loading the dynamite into the holes, and for an injury which resulted from his negligence in these particulars the master would not be liable."

We submit that an analysis of the above cases discloses that prior to the adoption of the act now under consideration the Supreme Court of Arkansas had not adopted the superior servant rule in any form. It certainly had not adopted the Ohio rule, and while in nearly all of the cases, from the Bloyd case down, some reference is to be found with respect to the question of whether or not the offending servant was a vice principal, such language does not indicate that the court was accepting the vice principal rule as it was generally understood. On the contrary the decisions indicate that the court conceived the law to be not only that the negligence must be in relation to a positive duty of the master, but in addition thereto the breach of this duty must be the act either of omission or commission of some agent occupying a position of the rank of a vice principal. In other words, the decisions instead of enlarging the master's liability under the vice principal exception, further contracted his liability under the non-delegable duty exception, by engrafting upon this exception a condition that even in respect to those duties the negligence must be that of a vice principal.

Certain it is that there is reasonable basis for interpreting the Arkansas decisions as limiting liability of the

master for the act of his agents of whatever rank to cases involving a breach of a non-delegable duty, and the Legislature was justified in adopting this construction when it came to legislate upon the subject, and so enact legislation to remedy the evil disclosed by the decisions as it so construed them. Under such construction of the cases the evil which the Legislature sought to remedy is readily apparent.

The directors, general superintendent, or other managing agents of corporations are regarded as vice principals (39 C. J. 587).

Since a corporation can act only through agents, and since the highest ranking agent it can designate is still only a vice principal, and since it was liable for the acts of such vice principal only in respect to positive duties which it owed to its servants, *it follows* that *at the time of the passage of this statute, a corporation, (solely because of its corporate character) was relieved of all liability for injury to its servants except for the breach of some personal, positive, and non-delegable duty.*

The original rule, as we have seen, exempted *corporations as a class* from all liability for injury to servants. The rule in Arkansas in 1907, as modified by Arkansas decisions, still relieved *corporations as a class* from all liability except for the breach of some non-delegable duty.

Such was not then, and is not now, the rule with respect to individual masters.

> "902. (10) Master liable for his personal misconduct of whatever kind it may be.—There is no exception to the rule that the violation by the master

himself of any of the duties enumerated in the foregoing sections constitutes a cause of action in favor of a servant who is injured thereby. A *prima facie* right to indemnity exists, therefore, whether the master's culpability was, under the doctrine prevailing in the jurisdiction where the accident occurred, one appertaining to the performance of a duty belonging to the *nondelegable* class, or a *mere detail of the work.* An obvious corollary of this principal is that the defense of a common employment is not available where the person whose negligence caused the injury is a partner of the defendant, as well as a fellow-workman of the injured person."

3 Labatt's Master & Servant, (2d ed.), par. 902, page 2396.

In 1907, at the time of the passage of this act here in question, *there existed a marked distinction in the application of the fellow-servant rule, between individuals, partnerships, and unincorporated associations on the one hand and corporations on the other.* Three or more men operating as a partnership or an association could be held liable for an injury to a servant caused by a negligent order given to the servant by one of the partners in regard to a mere *detail of the work*—while on the other hand in the case of three or more men operating a like business, as a corporation—neither they nor the corporation could be held liable under the same conditions, even though one of the incorporators as the executive officer thereof himself gave the command.

Although appellant is not itself a small corporation, it complains of the statute chiefly because of what it conceives to be discrimination against the corporation carrying on a small industry of the type usually carried on by a

partnership. Such are the illustrations given at pages 40 and 41 of counsel's brief, and they also quote at length from *Bedford Quarries* v. *Bough*, which case holds a similar statute unconstitutional largely, if not entirely, on the ground that it did not afford equal protection to the small corporation. The illustration which we have cited in the preceding paragraph shows that in Arkansas prior to the statute there existed inequality in the application of the fellow-servant rule in favor of corporations and against partnerships, which was more clearly manifest, and doubtless most frequently occurred, in cases of the small industry.

In the application of the fellow-servant doctrine as established and declared by the Arkansas court at the time of the adoption of this statute, corporations constituted a separate and distinct class. The Legislature did not create the class, it merely recognized it, and enacted a statute dealing with the class, which rested upon a difference which bore a reasonable and just relation to the legislation thus enacted. Such an act meets every requirement of the equal protection clause of the Fourteenth Amendment.

If it be said that, although the statute abolished the distinction then existing it created a new and different one, the answer is that once the right to classify is shown, the details of the legislation and the exceptions to be made are in the sound discretion of the Legislature.

Watson v. *Maryland*, 218 U. S. 173, 54 L. E. 987;

Griffin v. *Connecticut*, 218 U. S. 563, 54 L. E. 1151.

The superior servant rule, whether in the broad form of the Ohio rule, or the more limited form of the [redacted]ice prin-

cipal rule, was invented to meet the economic changes caused by the substitution of corporations for natural persons in commercial enterprises. Not only that, as appears from statements to be found in the decisions and text books, there was in fact a question as to whether, in this regard, there should not be one rule applying to corporations and a different one to natural persons, and some of the courts and text writers answered that question in the affirmative.

While Mr. Beach in his work on Contributory Negligence answers this question in the negative he admits the existence of the question saying:

> "Should there be one rule in this particular applicable to corporations and another less stringent one applicable to other defendants?—The constructive or presumed presence of the corporation in the acts of its servants is a favorite doctrine with some judges and text writers. Under the influence of this theory, in some jurisdictions there is attempted a distinction in this regard between a corporation and a natural person. Inasmuch as bodies corporate can, from their very nature, act only through an agent it is urged that, unless this executive agent is to be deemed for the purposes of this rule the corporation itself, there will result in favor of the corporation an immunity which is denied to men who carry on their business in person."

Beach on Contributory Negligence, (3rd ed.), par. 329, page 472, citing 1 Redfield on Railways 310;

Patterson v. *Pittsburg, etc. R. Co.*, 76 Penn. St. 389;

Buckner v. *N. Y., etc. R. Co.*, 49 N. Y. 672;

Cumberland, etc. R. Co. v. *Moran*, 44 Ind. 283.

While the two cases first establishing the Ohio rule did not limit its application to corporations, the opinions suggest that such a limitation would not be improper.

Railway v. *Stevens*, 20 Ohio 416, 438;

Railway v. *Keary*, 3 Ohio State 201, 210.

Kentucky adopts a modified form of the Ohio rule, and limits its application to corporations, on account of the constructive and presumed presence of the corporation in the acts of its servants.

Louisville & N. R. Co. v. *Collins*, 2 Duv. (Ky.) 114.

Judge Redfield approves the doctrine of the Kentucky case, *Redfield on Railways*, page 569, and bases his approval upon the fiction of the constructive presence of the corporation, which he points out is consistent with the conclusion reached by him at pages 547-549 of the same work, with respect to liability of corporations for willful wrongs at which point the learned Judge said:

> "But in some cases it has been held * * * that a corporation is not liable for the willful acts of its agents, unless done with the assent of the corporation. * * *
>
> "But they (these cases) seem to have lost sight of, or not sufficiently to have considered, * * * that the superior is virtually always present, in the person of any of the employees, within the range of the employment, as much as is practicable in such cases. And this consideration, in regard to natural persons, is held sufficient to make the superior liable for the act of the subordinate, whether done negligently or willfully."

In *Patterson* v. *Pittsburg, etc. R. Co.*, 76 Pa. 389, 394, it is said:

"The plaintiff's offer met this requirement. He proposes to prove that he notified the superintendent and foreman of the dangerous character of the switch in question. It is objected however that this would not be sufficient, because notice to a subordinate, however extensive his authority, is, after all, but notice to a fellow-servant, and therefore not binding on the master. In ordinary cases such is undoubtedly the rule, but its strict application in the case of *corporations* * * * is impracticable."

The opinion of Mr. Justice Field in the case of *Chicago, etc., R. Co.* v. *Ross*, 112 U. S. 377, shows clearly not only that the superior servant rule was invented to meet the situation presented by corporations, but we think the opinion is subject to the construction that such rule applies only in the case of corporations. The learned Justice says:

"There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence."

If it was not intended to limit the rule to corporations, then the words "of a corporation" used twice in the quotation are mere surplusage, and if stricken out the quotation would state the rule as applying to servants of all masters whether corporations or natural persons.

That the opinion intended to limit the rule to corporations is further borne out by the fact that it quotes from *Malone* v. *Hathaway*, 64 N. Y. 5, which case, as we have previously pointed out, makes a distinction in the application

of the nondelegable duty rule, as between corporations and natural persons. Further support of this construction is found in the fact that the opinion also cites and quotes from *R. R. Co.* v. *Collins*, 2 Dur. (Ky.) 114, as well as the comments thereon made by Judge Redfield, which case and text make a sharp distinction in the application of the rule between corporations and natural persons.

It is true that the Ohio rule, which seems to have been accepted in the Ross case, was contracted into the vice-principal rule by the opinion of Mr. Justice Brewer in the case of *B. & O. R. Co.* v. *Baugh*, 149 U. S. 368, but it is not suggested in that case that the new or modified rule there established applied to other than corporate employers.

In fact in a still later opinion by Mr. Justice Brewer it seems to be taken as settled that both the superior servant rule and the separate department rule, as each are approved in modified form by the Supreme Court of the United States, apply only to corporations. The learned Justice says:

> "But where the employer is a railroad *or other corporation* having a large number of employees, sometimes engaged in different departments of service, certain limitations or qualifications of this general rule have been prescribed."
>
> *Northern Pac. R. Co.* v. *Dixon*, 194 U. S. 338, 343.

Since, therefore, some jurisdictions applied the fellow-servant doctrine differently as between corporations and natural persons, so that in fact there was a different rule for each class it would have been proper for the legislative power within these jurisdictions to recognize these separate rules, and legislate as to one without disturbing the other.

In jurisdictions like Arkansas, where the rule was applied uniformly between the two classes, but the certain well-recognized exceptions to the rule, particularly applicable to corporations had not been adopted, the legislative power could determine (1) whether such exceptions should be adopted, and if so (2) should they be made to apply to corporations or to both corporations and natural persons.

If the above premise is correct, then it follows that the right to treat corporations as a separate class for legislation in respect to the fellow-servant rule is established, and as to them the rule may be completely abrogated.

The sole ground of complaint against this statute is that it does not include natural persons, who may be engaged in a similar business to that being carried on by a corporation. The equal protection clause of the Fourteenth Amendment does not require mathematical nicety, nor that a state shall regulate all or none.

Mr. Justice Stone says in the case of *Silver* v. *Silver*, 280 U. S. 117, 123:

> "* * * there is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied—that the Legislature must be held rigidly to the choice of regulating all or none. (Citing cases.) In this day of almost universal highway transportation by motor car, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the Legislature may regard as an evil, as to justify legislation aimed at it, even though some abuses may not be hit. (Citing cases.) *It is enough that the present statute strikes*

at the evil where it is felt, and reaches the class of cases where it most frequently occurs."

Mr. Justice Holmes says in the case of *Central Lbr. Co.* v. *South Dakota*, 226 U. S. 157, 160:

> "If a class is deemed to present a conspicuous example of what the Legislature seeks to prevent, the 14th Amendment allows it to be dealt with, although otherwise and merely logically not distinguishable from others not embraced in the law."

Mr. Justice Holmes says in *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411:

> *"Again, if an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation."*

The evil which the Legislature here sought to remedy is made clear by the language of Mr. Justice Monks in the case of *Bedford Quarries Co.* v. *Bough*, 168 Ind. 671, where he says: "It cannot be denied, however, that in present industrial conditions, the co-servant doctrine * * * has, when applied to the facts of many cases, become arbitrary, rather than a reasonable rule of law."

This evil was specially experienced in cases where the master was a corporation. It was these cases which presented a conspicuous example of the evil, and it was here where the evil was most severely felt and most frequently occurred.

This evil was all the more glaring in Arkansas because of the lack of the superior servant exception and the separate department exception, two qualifications of the general rule which had been applied in other jurisdictions in an effort to correct, to some extent at least, the evil presented by the corporation in the application of the rule.

Nor can it be said that the acceptance of these exceptions would have corrected the evil. Certainly not if the superior servant exception had been accepted only in the limited form of the vice principal rule (and the most liberal interpretation of the Arkansas cases would go no farther than this) for corporations usually carry on their work by, and present a conspicuous example of that method of work which subjects servants to the supervision and control of foremen and other directing overseers, who as a rule do not occupy a position of the rank of a vice principal, but to whom the servants must yield absolute obedience.

It cannot be said, however, that even in those jurisdictions which had accepted all four of the exceptions in their most liberal form, that all of the evils incedent to applying the fellow-servant doctrine in favor of corporations had been eliminated. Certainly this court cannot say *a priori* that the evil in a rule of law, which in its inception was so broad as to completely relieve corporations from liability for injury to their servants, had been fully remedied by four exceptions which made them liable under certain specific circumstances, and which exceptions were constantly undergoing change by reason of frequent interpretations and applications thereof in the decisions, so much so that the law was in a constant state of flux.

The Legislature may have believed that as between a servant and a personal master, who were ordinarily in daily contact with each other, so that the master could feel a moral responsibility for the servant's safety, and the servant could directly, orally, and with the full assurance that his report would be held in strict confidence, report to the master that a fellow-servant, even his immediate superior, was negligent or incompetent; the competent servant exception was sufficient safeguard. But it may have found that in case of a corporation, acting only through agents with the management often far removed from the scene of active operations, the personal contact of the servant with the corporation being only through his immediate superiors, themselves fellow-servants, having no right to hire and fire, and whose knowledge of a servant's incompetency would not constitute notice to the corporation, so that in order to charge the company with notice the servant would have to report in writing to some officer having power to hire and fire, thereby making it less likely that the report would be kept secret and the servant protected, the situation was so different that the common-law rule did not afford ample protection.

Likewise, the Legislature may have found that generally in Arkansas corporations were engaged in that type of business which carried with it increased hazard to their employees, such as manufacturing, mining, operating railroads, street cars, electrical systems, gas lines, etc., while as a general rule the individual employer was engaged in business where his employee was relatively safe; such as agriculture, the trades, etc.

The Legislature may have found that ordinarily corporations operated large enterprises, employing many men, in separate departments, while as a rule the business of an individual employer was small and confined to one unit.

If the Legislature found such differences, it could in its judgment make a choice of method to guard against the evil.

Metropolitan Casualty Ins. Co. v. *Brownell,* 294 U. S. 580;

Standard Oil Co. v. *Marysville,* 279 U. S. 582, 584, 73 L. E. 856, 859;

Hardware Dealers' Mut. F. Ins. Co. v. *Glidden Co.,* 284 U. S. 151, 158, 76 L. E. 214, 219.

It could likewise decide whether the differences were general enough as respects corporations, to call upon it to say whether the provisions of the act should be applied to them as a class rather than to members of it selected by more empirical methods.

Metropolitan Casualty Co. v. *Brownell, supra;*

Ohio ex rel. Clarke v. *Deckebach,* 274 U. S. 392, 71 L. E. 1120;

Westfall v. *United States,* 274 U. S. 256, 259, 71 L. E. 1036, 1037;

Silver v. *Silver,* 280 U. S. 117, 123, 74 L. E. 221, 225.

The cases of *Ballard* v. *Mississippi Cotton Oil Co.,* 51 Miss. 507; *Bedford Quarries Co.* v. *Bough,* 168 Ind. 671, and *Chicago etc. R. Co.* v. *Westby,* 187 Fed. 619, relied on by appellant, are all based upon the theory that the equal protection clause requires that a statute include every class to

which it might be applied. Such is not in accord with the decisions of this Court.

Appellant concedes that the question decided by the Circuit Court of Appeals for the Eighth Circuit in the case of *Railway* v. *Westby, supra,* is not the same as the question presented here. That case is evidently presented by appellant, because it cited and quoted from *Ballard* v. *Mississippi Cotton Oil Co., supra,* and appellant conceives this to show by implication that the Circuit Court of Appeals for the Eighth Circuit approves the decision in the Ballard case holding that corporations do not present a proper class for separate legislation in respect to this rule.

Even if this were so, which we do not concede, a later decision by the same court implies just the opposite—a decision which deals with the same statute under consideration here—for in the case of *Keammerling* v. *Athletic Min. & Smelting Co.,* 2 Fed. (2) 574, that Court extended the application of the doctrine of *res ipsa loquitur* to cases between corporate master and their servants solely because of the very statute here in issue. Section 7137 of Crawford & Moses' Digest of the Statutes of Arkansas.

Although the decision in the case of *Power Mfg. Co.* v. *Saunders,* 274 U. S. 294, relied on by appellant, points out that the statute then in question prescribed a different rule of practice for foreign corporations than that prescribed for domestic corporations and individuals, the true vice of the statute was the distinction made between the two classes of corporation. This is clearly demonstrated by the later case of *Bain Peanut Co.* v. *Pinson,* 282 U. S. 499, where a similar statute which applied alike to both

classes of corporations but not to natural persons was upheld.

In the case of *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, it was held that a statute, requiring corporations, domestic and foreign to furnish to an employee who is discharged or voluntarily leaves the employment a service letter, is not repugnant to the equal protection clause, because such statute did not include individual employers.

A few of the cases which we think are applicable here and which have not been previously referred to are:

Crescent Cotton Oil Co. v. *Mississippi*, 257 U. S. 129;

Fort Smith Lbr. Co. v. *Arkansas*, 251 U. S. 532;

Mallinckrodt Chem. Works v. *Missouri*, 238 U. S. 41;

Hammond Packing Co. v. *Arkansas*, 212 U. S. 322;

Skinner v. *Garnett G. M. Co.*, 96 Fed. 735.

ASSUMING THAT APPELLANT MAY NOW RAISE QUESTION THAT ACT IS INVALID AS TO FOREIGN CORPORATIONS SPECIALLY, IN SPITE OF FACT THAT IT ASSIGNS ERROR SOLELY ON GROUND THAT ACT IS INVALID BECAUSE IT DENIES EQUAL PROTECTION TO ALL CORPORATIONS, SUCH GROUND IS UNAVAILING FOR IN ALL EVENTS ACT IS VALID AS TO DOMESTIC CORPORATIONS UNDER STATE'S RESERVED POWER TO AMEND CHARTERS AND FOREIGN CORPORATIONS CAN CLAIM NO GREATER RIGHT THAN IS ACCORDED DOMESTIC CORPORATIONS

In the case of *Ozan Lumber Co.* v. *Biddie*, (Nov. 2, 1908) 87 Ark. 587, the Supreme Court of Arkansas held this statute valid as to domestic corporations, as a valid exercise of the right reserved by Article 12, section 6 of the Constitution of the State to alter corporate charters.

This decision was entirely in harmony with the decisions of the Supreme Court of the United States.

Berea College v. *Kentucky*, (Nov. 9, 1908) 211 U. S. 45, 54, 56, and cases cited.

While as was said by Mr. Justice Brewer in the above case, "It is undoubtedly true that the reserved power to alter or amend is subject to some limitations," no case we have found suggests a limitation which would prohibit a statute such as this. On the contrary we construe the decisions as expressly approving statutes of this character as a proper exercise of the reserve power to alter charters of domestic corporations.

In the case of *Missouri Pacific* v. *Mackey*, 127 U. S. 205, the appellant a Kansas corporation sought to strike down a statute of that State, abrogating the fellow-servant rule as to railroad corporations but not as to natural persons operating railroads, nor as to other corporations or persons generally.

The first premise adopted by Mr. Justice Field in support of the decision that the law was valid, appears to be that such a statute when applied to domestic corporations in general was a valid exercise of the reserve power to alter charters, for at page 209 of the report he says:

> "The plain answer to this contention is that the liability imposed by the law of 1874 arises only for

injuries subsequently committed; it has no application to past injuries, *and it cannot be successfully contended that the State may not prescribe the liabilities under which corporations created by its laws shall conduct their business* in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every State."

Additional support for the view that the Mackey case decided that such legislation is valid when applied to all domestic corporations, is found in the fact that the learned Justice considered it necessary to go no farther than to find a distinction between railroad corporations and corporations generally. At page 210 of the report he says:

"But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to *railroad corporations* having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not similar to dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination."

In *Tullis* v. *Lake Erie & Western Ry. Co.*, 175 U. S. 348, this Court sustained a similar statute of Indiana, as applying to railroad corporations. In the briefs filed in that case it was pointed out that the statute discriminated "between railroads owned by individuals, co-partnerships or joint stock companies and those owned by corporations." The opinion of the Court does not directly deal with this question, but it seems to be assumed that such a statute if applied to all corporations but to no other employers would be valid.

It appears to us that the decision in *Ozan Lbr. Co.* v. *Biddie, supra,* is accepted by this Court as sound law in so far as it applies to domestic corporations. In *Aluminum Co.* v. *Ramsey,* 222 U. S. 251, 255, Mr. Justice McKenna says:

> "In *Ozan Lumber Co.* v. *Biddie, supra,* the court decided that 'the fellow-servant law' was an amendment to the charters of corporations, made, under the right reserved in the Constitution of the State to repeal, alter, or amend such charters. The Ozan Lumber Company, however, was a *domestic corporation, and whether the principle of the decision would be applicable to foreign corporations, as plaintiff in error in the case at bar is, being a Pennsylvania corporation, depends on many considerations, and involves questions not local.*"

The question as presented in the court below, and as here presented by appellant's assignment of error, is not that the statute is invalid as to foreign corporations, but that it is invalid as to all corporations, domestic and foreign (R. 14 and 98).

Since the limited question of the validity of this statute as affecting foreign corporations was not raised in the court below nor by the assignment of error in this court, it cannot be considered.

Rosenthal v. *New York,* 226 U. S. 260, 272.

But had the question been timely and properly presented, the fact that the statute applies equally to and is valid as to domestic corporations would be a sufficient answer, for as was said by Mr. Justice Field in the case of *Pembina, etc. Co.* v. *Pennsylvania,* 125 U. S. 181, 189:

> "The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State."

Especially should this be the rule applying to foreign corporations doing business in Arkansas, for the Constitution of this State provides that foreign corporations admitted to the State "shall be subject to the same regulations, limitations, and liabilities as like corporations of this State."

Constitution of Arkansas, Art. 12, sec. 11.

This court has frequently held that that which a State may do with corporations of its own creation, it may do with foreign corporations admitted therein.

Orient Ins. Co. v. *Daggs*, 172 U. S. 557;

New York Life Ins. Co. v. *Cravens*, 178 U. S. 389;

Prudential Ins. Co. v. *Cheek*, 259 U. S. 530;

Dayton Coal & Iron Co. v. *Barton*, 183 U. S. 23.

CONCLUSION

Not only has appellant failed to meet the burden imposed upon it to show facts entitling it to raise the question and that the statute is palpably unreasonable and arbitrary, but on the contrary the history of the fellow-servant doctrine discloses that corporations have always presented a distinct problem, constituting them a separate class, to which the courts have often applied different rules than that applied to individual masters. The classification being thus justified and long recognized it was not palpably unreasonable and arbitrary for the Legislature to carry it into this statute.

The judgment of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

L. B. SMEAD,
Of Camden, Arkansas,

J. V. SPENCER,

C. E. WRIGHT,

ROBERT C. KNOX,
Of El Dorado, Arkansas,

Counsel for Appellee.